2009

State of Utah v. Daniel Maestas : Reply Brief

Utah Court of Appeals

Karen A Klucznik; Assistant Attorney General; Mark Shurtleff, Attorney General; Attorneys for Appellee.
Lori J. Seppi; Salt lake legal defender assoc; Attorneys for Appellant .

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
DANIEL MAESTAS,	:	Case No. 20090473-CA
Defendant/Appellant.	:	Appellant is incarcerated.

REPLY BRIEF

Appeal from a judgment of conviction for one count each of Automobile Homicide, a second degree felony, in violation of Utah Code Ann. § 76-5-207(3) (Supp. 2007), Reckless Driving, a class B misdemeanor, in violation of Utah Code Ann. § 41-6a-528 (2005), and Open Container in a Vehicle, a class C misdemeanor, in violation of Utah Code Ann. § 41-6a-526(2) (2005), in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Vernice Trease presiding.

LORI J. SEPPI (9428)
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Appellant

KAREN A. KLUCZNIK (7912)
Assistant Attorney General
MARK SHURTLEFF (4666)
ATTORNEY GENERAL
Heber M. Wells Building
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854

Attorneys for Appellee

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
DANIEL MAESTAS,	:	Case No. 20090473-CA
Defendant/Appellant.	:	Appellant is incarcerated.

REPLY BRIEF

Appeal from a judgment of conviction for one count each of Automobile Homicide, a second degree felony, in violation of Utah Code Ann. § 76-5-207(3) (Supp. 2007), Reckless Driving, a class B misdemeanor, in violation of Utah Code Ann. § 41-6a-528 (2005), and Open Container in a Vehicle, a class C misdemeanor, in violation of Utah Code Ann. § 41-6a-526(2) (2005), in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Vernice Trease presiding.

LORI J. SEPPI (9428)
SALT LAKE LEGAL DEFENDER ASSOC.
424 East 500 South, Suite 300
Salt Lake City, Utah 84111

Attorneys for Appellant

KAREN A. KLUCZNIK (7912)
Assistant Attorney General
MARK SHURTLEFF (4666)
ATTORNEY GENERAL
Heber M. Wells Building
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854

Attorneys for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
DANIEL MAESTAS,	:	Case No. 20090473-CA
Defendant/Appellant.	:	

INTRODUCTION

In Part I of his opening brief, Maestas argues that the trial court erred when it denied his motion to suppress the hospital statements. This Court should follow Maestas's analysis because he has cited the relevant case law and properly preserved his claim. Moreover, this Court should reverse because the State has not met its burden of demonstrating that the admission of the hospital statements was harmless beyond a reasonable doubt.

First, in support of his involuntary confession argument, Maestas cites relevant case law from Utah, the United States Supreme Court, and other jurisdictions. In particular, he cites State v. Rettenberger, 1999 UT 80, 984 P.2d 1009. In its response, the State faults Maestas for not citing Colorado v. Connelly, 479 U.S. 157 (1986), and claims that Connelly defeats Maestas's claim. The State's claim fails because Connelly has limited application and is not relevant here, Rettenberger was issued after Connelly and explains how Connelly and other involuntary confession jurisprudence are applied in Utah, and Maestas's claim succeeds under Rettenberger and relevant case law. See infra at Part I.A.

Second, Maestas argues that this Court should not conduct a harmless error analysis because the Utah Constitution requires reversal whenever a coerced confession is admitted at trial. The State does not respond to Maestas's claim except to say that the Court should not to address it because it is not preserved. This Court should address Maestas's constitutional claim, however, because the preservation rule does not apply and, even if it did, the claim is preserved. See infra at Part I.B.

Third, this Court should reverse because the State has not shown that the admission of the hospital statements was harmless beyond a reasonable doubt. The State cites just two pieces of evidence to demonstrate that the admission of the hospital statements was harmless beyond a reasonable doubt. The first piece of evidence is Maestas's statement, "Fuck, that's homicide," made in response to his cousin's statement that "someone had died in the wreck." This piece of evidence, however, is irrelevant to the harmlessness analysis because it is among the statements that should have been suppressed. The second piece of evidence is Maestas's affirmative response to the paramedic's inquiry about whether he was the driver. But Maestas's response was given at the scene of the accident, while the paramedics were giving him first-response care, preparing him for life-flight, instructing him on their emergency procedures, and asking him numerous questions in order to assess his level of consciousness. Given the ambiguity of the statement and the unreliable circumstances in which it was given, therefore, this single piece of evidence does not show that the hospital statements did not contribute to the conviction. See infra at Part I.C.

In Part II of his opening brief, Maestas argues that defense counsel provided ineffective assistance when she failed to investigate Bloomfield's exculpatory statement or

the law that made it admissible at trial. As explained in the opening brief, if defense counsel had adequately investigated the case, she would not have had to rely on last-ditch, untimely, and unsuccessful efforts to get the statement admitted. See Aplt. Br. at 41-48. Instead, she could have followed the processes necessary to get the evidence admitted under rule 804(b)(3) or 801(d)(1)(A) or she could have filed a timely motion to sever and gotten the statement admitted at Maestas's later trial. See id.

In response, the State first claims that the Court should not consider whether rule 801(d)(1)(A) was an avenue that defense counsel should have pursued because, in its estimation, Maestas inadequately briefed his claim that defense counsel was deficient for not investigating that rule. See Aple. Br. at 40-41. This Court should consider whether rule 801(d)(1)(A) was an important avenue of investigation, however, because Maestas adequately briefed his argument. See infra at Part II.A. Then, if the Court holds that rule 801(d)(1)(A) was not an important avenue of pursuit, it should still reverse because defense counsel provided deficient performance for not preparing ahead of trial to get the statement admitted under rule 804(b)(3) or to file a timely motion to sever. See Aplt. Br. at 41-50.

Second, the State responds that Maestas was not prejudiced by defense counsel's failure to investigate rule 801(d)(1)(A) because Bloomfield's statement, even if it had been admitted under that rule, would only have been admitted as impeachment evidence. Aple. Br. at 41-42. This claim fails because rule 801(d)(1)(A) does not distinguish between types of inconsistent statements; rather, all inconsistent statements admitted under rule 801(d)(1)(A) are admitted as substantive evidence. See infra at Part II.B.

Third, the State claims that defense counsel was not deficient for failing to put

Bloomfield on the stand to personally invoke the Fifth Amendment because "all parties stipulated to Bloomfield's unavailability." Aple. Br. at 43-44. The State's argument is contrary to State v. White, 671 P.2d 191 (Utah 1983). See infra at Part II.C. Regardless, if this Court agrees with the State, it should still reverse because, as explained in Maestas's opening brief, the exclusion of Bloomfield's statement was erroneous and but for defense counsel's failure to investigate the case before trial she would have been prepared to get the evidence admitted under rule 801 or 804 or she could have filed a timely motion to sever and gotten the evidence admitted at Maestas's later trial. See Aplt. Br. at 42-48.

Fourth, the State claims that this Court should reject Maestas's argument that defense counsel was deficient for failing to fully investigate the facts of the case and rule 804(b)(3) before trial because Maestas did not address three bases "of the trial court's ruling." Aple. Br. at 44. Two of the State's proposed bases, however, were not part of the trial court's ruling. The third proposed basis—Bloomfield's statement was protected by the attorney-client privilege—is overstated by the State. Moreover, Maestas properly acknowledged the trial court's concerns in his opening brief and argued that Bloomfield's statement was admissible under rule 804(b)(3) despite these concerns. See infra at Part II. D.

ARGUMENT

I. THIS COURT SHOULD REVERSE THE DENIAL OF MAESTAS'S MOTION TO SUPPRESS BECAUSE MAESTAS HAS CITED THE RELEVANT CASE LAW AND PRESERVED HIS CLAIM, AND THE STATE HAS NOT SHOWN THAT THE ADMISSION WAS HARMLESS BEYOND A REASONABLE DOUBT

Maestas argues that the trial court erred when it denied his motion to suppress. This Court should follow Maestas's analysis because he has cited the relevant case law and

properly preserved his claim. See infra at Parts I.A., I.B. Moreover, this Court should reverse because the State has not met its burden of demonstrating that the admission of the hospital statements was harmless beyond a reasonable doubt. See infra at Part I.C.

A. Maestas's Involuntary Confession Argument Cites the Relevant Case Law.

Connelly is not the "seminal case" in involuntary confession jurisprudence. Aple. Br. at 17. When published, it did not "constitute[] a wholesale departure from previous voluntariness jurisprudence" or overrule any prior case law. Rettenberger, 1999 UT 80 at ¶17; see Connelly, 479 U.S. at 163 (citing with favor the voluntariness "cases considered by this Court . . . since Brown v. Mississippi[, 297 U.S. 278 (1936)]"). Rather, it was just one case in a long line of cases that applied the totality of the circumstances test to determine the voluntariness of a confession. See Rettenberger, 1999 UT 80 at ¶17. Furthermore, it was a case with "limited" application and no application in this case because it involved a unique set of circumstances where "[t]here was . . . no police coercion of any kind." Id. at ¶¶17-18.

Rettenberger, which was issued after Connelly, explains how Connelly and other involuntary confession jurisprudence are applied in Utah. See Rettenberger, 1999 UT 80 at ¶¶11-45. Accordingly, it is Rettenberger's interpretation of Connelly and other involuntary confession cases that Maestas relies on in his opening brief. See Aplt. Br. at 17-27.

As explained in Rettenberger, "Connelly stands for the limited proposition that a defendant's mental condition is not in itself sufficient to make a confession involuntary." Rettenberger, 1999 UT 80 at ¶17 (citing Connelly, 479 U.S. at 165). This is because the circumstances of that case presented "no police coercion of any kind." Rettenberger, 1999 UT 80 at ¶18. In that case, the defendant "approached" the officer "and, without any

prompting, stated that he had murdered someone and wanted to talk about it." Connelly, 479 U.S. at 160. Throughout his interaction with police, defendant "appeared to understand fully the nature of his acts." Id. It was not until later, when being interviewed by the public defender, that he "became visibly disoriented" and "stated that 'voices' had told him to . . . confess[]." Id. at 161. In sum, the issue in Connelly "was simply whether a defendant's mental state alone could be sufficient to render a confession constitutionally involuntary." Rettenberger, 1999 UT 80 at ¶18. Although the Court answered that question in the negative, it "specifically reaffirmed the principle that a confession may be suppressed in circumstances in which a police officer knows of a suspect's mental illness or deficiencies at the time of the interrogation and effectively exploits those weaknesses to obtain a confession." Id. (citing Connelly, 479 U.S. at 164-65; Blackburn v. Alabama, 361 U.S. 199, 207-08 (1960); Townsend v. Sain, 372 U.S. 293, 298-99 (1963)).

In other words, both before and after Connelly, when evaluating the totality of the circumstances, "courts must consider such external [or objective] factors as the duration of the interrogation, the persistence of the officers, police trickery, absence of family and counsel, and threats and promises made to the defendant by the officers." Rettenberger, 1999 UT 80 at ¶14 (citations omitted). "In addition, 'as interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the 'voluntariness calculus.'" Id. at ¶15 (quoting Connelly, 479 U.S. at 164). "Thus, under the totality of circumstances analysis, courts must also consider such [internal or subjective] factors as the defendant's mental health, mental deficiency, emotional instability, education, age, and familiarity with the judicial system."

Rettenberger, 1999 UT 80 at ¶15 (citations omitted); see, e.g., State v. Gagnon, 651 A.2d 5, 6 (N.H. 1994) (post-Connelly case holding confession involuntary where defendant exhibited signs of intoxication, fell asleep, said "he did not understand anything" when asked if he understood his *Miranda* rights, and made contradictory statements); State v. Young, 875 P.2d 1119, 1122-23 (N.M. Ct. App. 1994) (post-Connelly case noting evidence may have warranted suppression even though defendant spoke coherently and responded well to questions because he had a blood alcohol level of 0.31); Commonwealth v. Peterson, 424 S.E.2d 722, 723 (Va. Ct. App. 1992) (post-Connelly case holding confession involuntary where defendant was questioned in ambulance while he was "in pain, his vision blurred, and he was unable to understand 'everything that was going on around' him," and he had "ingested cocaine," was having difficulty breathing, and was connected to a heart monitor).

An important question when analyzing "the extent to which [the defendant's internal characteristics] made him more susceptible to manipulation," is what was "known to the interrogating officers." Rettenberger, 1999 UT 80 at ¶37. In Connelly, the officers "perceived no indication whatsoever that [defendant] was suffering from any kind of mental illness." Connelly, 479 U.S. at 161. Thus, there was no "'police conduct causally related to the confession.'" Rettenberger, 1999 UT 80 at ¶18 (quoting Connelly, 479 U.S. at 164). Whereas, in Rettenberger, the trial court "specifically found 'that the interrogating officers understood and were aware of [the defendant's mental deficiencies] and susceptibilities . . . at the time they were conducting the interrogation.'" Rettenberger, 1999 UT 80 at ¶¶16, 38. Our supreme court, therefore, reversed because the defendant's "will, already vulnerable due to certain known mental disabilities and deficiencies, was overborne by the suggestive and

coercive techniques used by the interrogators, which exploited those very vulnerabilities." Id. at ¶45; see Connelly, 479 U.S. at 164-65 (noting that in Blackburn "the police learned during the interrogation that [defendant] had a history of mental problems," and in Townsend, the officers "knew that [defendant] had been given drugs").

As explained in the opening brief, the totality of the circumstances in this case show that Maestas's confession was involuntary. See Rettenberger, 1999 UT 80 at ¶14. At the time of the interrogation, Officer Horner knew that Maestas had been in a serious car accident, was in the emergency room being treated for injuries, was intoxicated, was highly agitated, had memory loss, and was suffering severe mood swings. See Aplt. Br. at 21-23, 25-26. To the extent that Officer Horner did not know Maestas was medicated, it was only because he remained purposefully ignorant by not questioning the medical staff. See id. at 22-23, 26. Despite his knowledge, Officer Horner did not postpone questioning Maestas until he had regained awareness or even until he could gain the support of his friends, relatives, or counsel. See id. at 23.

On top of this, Officer Horner withheld important information during the interrogation and downplayed the seriousness of the situation. See Aplt. Br. at 24. Moreover, he did not record the interrogation or take verbatim notes. See id. at 24-25. Instead, he sifted through Maestas's statements, wrote down only those he interpreted as incriminating, and neglected to write down the questions he asked to elicit those statements. See id. Thereafter, he kept Maestas under constant supervision, listened to everything Maestas said while under the effects of trauma, pain, alcohol, and drugs, and continued to write down only those statements he interpreted as incriminating. See id. at 25. He never

gave Maestas the opportunity to write a confession or showed his notes to Maestas so that Maestas could review and sign them as a written confession. See id. at 26. And he misplaced his notebook so that by the time of the hearing, he could no longer even reference his notes to try to reconstruct the circumstances of Maestas's supposed admissions. See id.

In sum, Connelly's "limited" holding is immaterial in this case. Rettenberger, 1999 UT 80 at ¶17. Rather, Rettenberger and the other cases cited by Maestas govern the outcome of this issue. Thus, for the reasons stated above and in the opening brief, this Court should reverse because the trial court erred when it denied Maestas's motion to suppress the hospital statements, and defense counsel provided ineffective assistance when she failed to investigate or present evidence regarding the effects of medication on Maestas's intoxicated state and failed to renew the motion to suppress at trial.

B. Maestas's State Constitutional Claim Is Properly Preserved.

Maestas argues that the harmless-error rule is inapplicable to erroneously-admitted coerced confessions under the Utah Constitution. See Aplt. Br. at 27-30. The State claims the Court should not consider this argument because it is not properly preserved. See Aple. Br. at 33 n.8. To support its claim, the State asserts that "Maestas's suppression motion . . . did not include an argument under the state constitution." Id. (citing R. 67-71). This Court should address Maestas's argument, however, because the preservation rule does not apply to standards of reversal and, besides, Maestas's argument is properly preserved.

The preservation rule only applies to "substantive issue[s]." Hart v. Salt Lake County Comm'n, 945 P.2d 125, 129 (Utah Ct. App. 1997); see Utah R. App. P. 24(a)(5)(A) ("A statement of the issues presented for review, including for each issue: the standard of

appellate review with supporting authority; and . . . citation to the record showing that the issue was preserved in the trial court."). This is because "[t]he trial court is considered 'the proper forum in which to commence thoughtful and probing analysis' of issues." State v. Brown, 856 P.2d 358, 360 (Utah Ct. App. 1993) (citation omitted). "[T]o ensure the trial court's opportunity to consider an issue," therefore, "appellate review of criminal cases . . . requires 'that a contemporaneous objection or some form of specific preservation of *claims of error* must be made a part of the trial court record.'" Id. (citations omitted) (emphasis added); see State v. Holgate, 2000 UT 74, ¶11, 10 P.3d 346.

The trial court, however, is not the proper forum in which to argue what will be the proper standard of review and reversal on appeal. Rather, the proper forum in which to argue the standard of reversal is the court that must apply that standard: the appellate court. Thus, the preservation rule does not apply to procedural appellate issues because those issues do not become relevant until appeal. See, e.g., State v. Brake, 2004 UT 95, ¶15, 103 P.3d 699 (setting new "non-deferential" standard of review for search and seizure cases); State v. Pena, 869 P.2d 932, 936-37 (Utah 1994) (explaining how appellate courts decide standard of review); State v. Thurman, 846 P.2d 1256, 1266 (Utah 1993) ("In Utah, the supreme court has . . . constitutional authority to manage the appellate process" and "exercise[s] [its] powers to fashion standards of review that [it] think[s] best allocate responsibility between appellate and trial courts in light of the particular determination under review"); Christensen v. Munns, 812 P.2d 69, 73 (Utah Ct. App. 1991) ("the purpose of" the standard of review requirement created by rule 24(a)(5) . . . "is to focus the [appellate] briefs, thus promoting more accuracy and efficiency in the processing of appeals"). Maestas,

therefore, was not required to preserve his claim that the Utah Constitution prohibits the application of the harmless-error rule to erroneously-admitted coerced confessions.

Besides, Maestas's claim is properly preserved. In the trial court, Maestas moved to suppress the alleged hospital statements because the questioning violated his "*state* and federal constitutional rights" since the officer questioned him without "advis[ing] him of his [*Miranda*] rights" and "obtained statements from [him] in a drug induced state in which severe pain from critical injuries, head trauma and a broken neck prevented any knowing and voluntary confession." R. 68 (emphasis added). The trial court denied Maestas's motion to suppress, R. 196-203; and Maestas appealed the denial of that motion. R. 205; 210. Thus, Maestas's state constitutional claim is properly before this Court for review.

Thus, for the reasons stated in the opening brief, this Court should hold that the Utah Constitution requires the conviction to be "set aside" if an "involuntary confession is obtained by state officers and introduced into evidence in a criminal prosecution." Blackburn, 361 U.S. at 205; see Aplt. Br. at 27-30.

C. The State Has Not Met Its Burden of Demonstrating that the Admission of the Hospital Statements Was Harmless Beyond a Reasonable Doubt.

The State claims that the admission of the involuntary confession in the emergency room was harmless beyond a reasonable doubt because Maestas said to his cousin while in room 617, "'Fuck, that's homicide,'" and responded affirmatively when the paramedic at the scene of the accident asked if he was the driver of the vehicle. Aple. Br. at 33.

First, Maestas's statements in room 617, including the statement cited by the State, are irrelevant to the harmless beyond a reasonable doubt analysis because they should have been suppressed as part of the involuntary confession or as fruit of the poisonous tree. See

Aplt. Br. at 25-27 & n.4. The State argues in a footnote that Maestas's comments in room 617 were not fruit of the poisonous tree because Maestas presented "no evidence suggesting that his . . . statements to family and friends were in any way the product of Officer Horner's questions." Aple. Br. at 24 n.1. The State overlooks pages 25-27 in the opening brief, where Maestas presents the evidence that Maestas's statements in room 617 were obtained either through unconstitutional police coercion or through exploitation of the primary illegality. See Aplt. Br. at 25-27. Officer Horner, wearing his full police uniform and firearm, moved with Maestas to room 617 and kept Maestas under constant supervision throughout the night. See id. at 25. He listened to everything Maestas said while under the effects of trauma, pain, alcohol, and medication. See id. Despite Maestas's wildly-fluctuating mood and his knowledge that Maestas had been injured in a serious accident and was intoxicated, Officer Horner did not ask the medical personnel about Maestas's condition. See id. at 25-26. Instead, he accepted Maestas's ranting utterances as rational statements and wrote down only those statements he interpreted as incriminating. See id. at 25. Further, he failed to record Maestas's other statements for context. See id. at 26. He also failed to give Maestas the opportunity to write or sign a confession. See id. Thereafter, he misplaced his notes so that by the time of the suppression hearing, he could no longer even reference his notes to try to reconstruct the circumstances of Maestas's alleged admissions. See id.

Second, Maestas's statements to the paramedic at the scene of the accident do not make the admission of his involuntary confession harmless beyond a reasonable doubt. When deciding whether the admission of a coerced confession was harmless beyond a reasonable doubt, the Court is "not concerned . . . with whether there was sufficient

evidence on which the [defendant] could have been convicted without the evidence complained of." Fahy v. Connecticut, 375 U.S. 85, 86 (1963). Rather, "[t]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." Id. at 86-87. In some cases, "two confessions, delivered on different occasions to different listeners, might be viewed as being independent of each other." Arizona v. Fulminante, 499 U.S. 279, 299 (1991) (citation omitted). "[O]ne confession [i]s *not* merely cumulative of the other," however, if "the jury's assessment of" an admissible confession "could easily have depended in large part on the presence of the [inadmissible] confession," or if "the jury might have believed that the two confessions reinforced and corroborated each other." Id. at 298-99; see Commonwealth v. Vasquez, 923 N.E.2d 524, 535 (Mass. 2010) ("if erroneously admitted evidence 'is corroborative of other evidence which, without such corroboration, permits reasonable doubt concerning a necessary element of proof,' erroneously admitted evidence 'is not merely cumulative because it would *necessarily* have contributed to the verdict'" (citation omitted)).

For example, in Fulminante, the Court held the erroneous admission of a coerced confession was not harmless beyond a reasonable doubt even though a second confession was properly admitted. See Fulminante, 499 U.S. at 296-300. In that case, the defendant allegedly confessed to a government informant and to the informant's wife. See id. at 283-84. The Court determined that the admission of the confession to wife did not render the admission of the confession to informant harmless beyond a reasonable doubt because "[a]bsent the admission at trial of the [confession to informant], the jurors might have found [wife's] story [about the confession to her] unbelievable." Id. at 298. Further, "it is clear

that the jury might have believed that the two confessions reinforced and corroborated each other. For this reason, one confession was *not* merely cumulative of the other." Id. at 299.

In this case, the admission of the coerced confession was harmful because it was not cumulative of Maestas's alleged statement to the paramedic. The paramedics at the scene were concerned with Maestas's health. He had just been in a serious car accident in which he had been ejected from the vehicle and knocked unconscious and the only other occupant of the vehicle had died. When they questioned him, their only purpose was "to determine his level of consciousness." R. 216:465, 488. Afterward, they could not recall exactly what questions they asked or exactly how he responded. R. 216:488. They just recalled that they "basically" asked him if he was the driver, and he answered in the affirmative. R. 216:488. This vague, short, possibly single-word response given shortly after Maestas regained consciousness when he was "groaning, rolling around" on the ground, looking "really disoriented," and undergoing rushed first-response care did not have nearly the same impact as the hospital confession. R. 216:461-66; 217:815. It was at the hospital where Maestas made the most incriminating statements. It was there that he said "he was driving a '99 Cadillac Deville" and that although he could not remember anything else about the evening, he remembered driving the Cadillac. R. 188:95-97, 112-13, 116-17; 214:59-61. It was there that he "asked if everybody was okay" and said, "'I want to know if I hurt anybody.'" R. 188:95, 97, 111-12, 115; 214:56, 59, 61. And it was there that he said, "'I'm sorry, mom,'" "'don't be mad at me,'" and "'Fuck, that's homicide.'" R. 188:99, 122; 214:68. In short, without the reinforcing and corroborating effect of the hospital statements, Maestas's brief, unreliable, and un-documented statement to the paramedic likely would have had little, if

any, effect on the jury. Thus, the hospital confession was not cumulative of the alleged statement to the paramedic. It was powerful confession evidence, and there is "a reasonable possibility that [it] might have contributed to the conviction." Fahy, 375 U.S. at 86.

II. DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE WHEN SHE FAILED TO INVESTIGATE BLOOMFIELD'S STATEMENT OR THE LAW THAT MADE IT ADMISSIBLE

Defense counsel provided ineffective assistance when she failed to investigate Bloomfield's exculpatory statement or the various options under the law for getting that statement admitted at trial. The State's arguments to the contrary are unavailing. First, Maestas adequately briefed his argument that counsel performed deficiently when she failed to investigate rule 801(d)(1)(A). See infra at Part II.A. Second, Maestas was prejudiced by counsel's deficient performance because the evidence, if it had been admitted under rule 801(d)(1)(A), would have been admitted as substantive evidence. See infra at Part II.B. Third, the parties could not stipulate that Bloomfield, if called to testify, would have invoked the Fifth Amendment and, even if they could, the exclusion of Bloomfield's statement was still erroneous and defense counsel's failure to adequately investigate the case before trial still resulted in ineffective assistance. See infra at Part II.C. Finally, Maestas properly addressed the trial court's ruling on rule 804(b)(3) and showed that defense counsel was deficient for failing to fully investigate the case and rule 804(b)(3) before trial. See infra at Part II.D.

A. Maestas Adequately Briefed His Claim that Defense Counsel Provided Deficient Performance When She Failed to Investigate Rule 801(d)(1)(A).

The State claims that Maestas inadequately briefed his claim that defense counsel provided deficient performance when she failed to investigate rule 801(d)(1)(A). See Aple. Br. at 40-41. To support its claim, the State cites "three sentences" of Maestas's argument

and asserts that these "three sentences" represent "Maestas's complete argument." See id. at 40. The three sentences cited by the State, however, represent only a part of Maestas's argument. The State overlooks pages 41 to 42 of Maestas's opening brief where he explains the Fifth Amendment privilege against self-incrimination and what needed to be done in order for Bloomfield to invoke the privilege. See Aplt. Br. at 41-42. It overlooks pages 46 to 48 of Maestas's opening brief where he explains how counsel's failure to investigate the law of the case, including rule 801(d)(1)(A), resulted in deficient performance because it led to last-ditch, untimely, and unsuccessful efforts to admit evidence that, with proper pre-trial investigation, would have been admissible. See id. at 46-48. And it overlooks pages 48 to 50 of Maestas's opening brief where he explains how counsel's deficient performance, including the failure to investigate rule 801(d)(1)(A), prejudiced Maestas. See id. at 48-50.

The State's claim of inadequate briefing is, in reality, a claim that the rule should be read differently than Maestas proposes. Maestas proposes that rule 801(d)(1)(A) is satisfied if the defendant takes the stand outside the presence of the jury and invokes the Fifth Amendment. See Aplt. Br. at 42-43. The State, on the other hand, asserts that "rule 801(d)(1)(A) requires that the declarant testify at the trial, i.e., in the presence of the jury, and be subject to cross-examination." Aple. Br. at 40. The State reasons, therefore, that because rule 801(d)(1)(A) would only have applied if Bloomfield testified "in the presence of the jury," and because Bloomfield was the co-defendant and protected by the right to silence, rule 801(d)(1)(A) did not apply to Bloomfield's prior statement. Id. at 40-41.

Nothing in the language of rule 801(d)(1)(A), however, requires the witness to testify in the presence of a jury. Rather, it only requires that "[t]he declarant testifies at the trial or

hearing and is subject to cross-examination concerning the statement." Utah R. Evid. 801 (d)(1). Nor does the State identify any cases that interpret rule 801(d)(1)(A) to require a witness to testify "in the presence of the jury." Aple. Br. at 40-41. Instead, it relies on the same case that Maestas relied on in his opening brief: State v. Whittle, 1999 UT 96, 989 P.2d 52. See Aple. Br. at 40. Whittle, however, does not say that rule 801(d)(1)(A) requires a witness to testify in the presence of the jury. See Whittle, 1999 UT 96 at ¶21 n.4. On the contrary, Whittle says "that under rule 801 . . . a prior statement by a witness is admissible if it is inconsistent with the witness testimony at trial," and that "inconsistency" for purposes of rule 801 includes "silence." Id. (quotation marks omitted).

Moreover, when read in context, the language from Whittle cited by the State is unhelpful in this case. In Whittle, the witness needed to re-take the stand and persist in his refusal to testify before his prior statement could be admitted under rule 801 not because rule 801 required him to testify in the presence of the jury but because his previous reliance on the Fifth Amendment had been "improperly allowed." Whittle, 1999 UT 96 at ¶19. In that case, the witness answered a few questions, "invoked the Fifth Amendment," and "was dismissed." Id. The next day, "the defense moved the court to bring [the witness] back to testify on the ground that [the witness] had been improperly allowed to rely on the Fifth Amendment." Id. Because the witness could not rely on the Fifth Amendment, defense counsel argued that he should be recalled and, if he "still refused to testify despite court order, his prior statements should come in under Utah Rule of Evidence 801[(d)(1)(A)]." Id. But "[t]he court did not allow [the witness] to be recalled." Id. On appeal, our supreme court noted that "the trial court may have committed error by failing to allow the defense to

recall [the witness] to the stand." Id. at ¶21. Explaining, the Court noted that inconsistency under rule 801 includes "silence." Id. at ¶21 n.4 (quotation marks omitted). Thus, "if [the witness] had re-taken the stand and persisted in his refusal to testify despite the court's order to do so [because he could not rely on the Fifth Amendment], his prior statements would have been admissible essentially to impeach his silence." Id.

Whereas, in this case, everyone agreed that Bloomfield could have properly invoked the Fifth Amendment. See Aplt. Br. at 14-15. Thus, it was not necessary, as it was in Whittle, to have Bloomfield retake the stand to see if he would persist in refusing to testify even though the Fifth Amendment did not protect him. Rather, it was only necessary for him to take the stand once in order to personally invoke the Fifth Amendment in response to a specific question. See Aplt. Br. at 41-42; infra at Part II.C. Further, to invoke the Fifth Amendment, Bloomfield was not required to take the stand in the presence of the jury. See Aplt. Br. at 42. On the contrary, Utah case law would have allowed Bloomfield "to testify before the trial judge in order to show unavailability [due to the Fifth Amendment]." White, 671 P.2d at 193-94; see State v. Schreuder, 712 P.2d 264, 274 (Utah 1985) ("There would have been no unethical conduct if the defendant's attorneys had merely called [witness] to testify under oath before the trial judge about her intentions regarding the privilege.").

B. Had Defense Counsel Properly Investigated the Case and Gotten the Evidence Admitted, It Would Have Been Admitted As Substantive Evidence.

The State claims that if Bloomfield's statement had been admitted under rule 801(d)(1)(A) it would only have been admitted as impeachment evidence because Bloomfield "refuse[d] to testify." Aple. Br. at 41-42. The State rests its argument on an inference drawn from a line in Whittle: If the witness had refused to testify, "his prior statements 'would have

been admissible essentially to impeach his silence.'" See id. at 41 (quoting Whittle, 1999 UT 96 at ¶21 n.4). From this line and two federal cases, including a federal case cited in Whittle, the State concludes that if Bloomfield had invoked the Fifth Amendment his statement could only have been admissible as impeachment evidence. See id. at 41-42. The State's inference, however, is not supported by Whittle, rule 801, or federal case law.

"Rule 801(d)(1)(A) is meant to 'provide a party with desirable protection against the "turncoat witness" who changes his story on the stand and deprives the party calling him of evidence essential to his case.'" United States v. Iglesias, 535 F.3d 150, 159 n.3 (3d Cir. 2008). Thus, Utah's rule, like the federal rule, defines inconsistency broadly: Inconsistent statements include '"'"diametrically opposed answers"'" as well as '"'"evasive answers, inability to recall, silence, or changes of position."'" Whittle, 1999 UT 96 at ¶21 n.4 (citing United States v. Russell, 712 F.2d 1256, 1258 (8th Cir. 1983)) (other citation omitted).

Further, Utah's rule, like the federal rule, draws no distinction between the different types of inconsistent statements: Rather, it admits all the different types of inconsistent "statements as substantive evidence." Utah R. Evid. 801, advisory committee note; see State v. Ramsey, 782 P.2d 480, 483-84 (Utah 1989); Fed. R. Evid. 801, advisory committee note ("Prior inconsistent statements traditionally have been admissible to impeach but not as substantive evidence. Under the rule [801] they are substantive evidence."). It is when prior statements are not inconsistent within the broad definition of rule 801(d)(1)(A) that they are "admissible only for impeachment purposes." Russell, 712 F.2d at 1258; see, e.g., State v. Shaw, 705 N.W.2d 620, 631 (S.D. 2005) (holding court properly concluded "victim's statements were admissible for impeachment purposes only" because victim's testimony was

not inconsistent since it did not contain "'evasive answers, inability to recall, silence, or changes of position'" (citations omitted)).[1] Therefore, in this case, as explained in the opening brief, if Bloomfield had taken the stand and invoked the Fifth Amendment, his prior statement would have been admissible as substantive evidence under rule 801(d)(1)(A) because it would have been inconsistent with his silence. See Aplt. Br. at 42-43.

C. Defense Counsel Was Ineffective For Not Insisting that Bloomfield Personally Invoke the Privilege Against Self-Incrimination; Regardless, the Trial Court's Exclusion of Bloomfield's Prior Statement Was Erroneous and Defense Counsel Was Ineffective For Not Thoroughly Investigating the Case.

The State claims that this case is distinguishable from White because "all parties stipulated to Bloomfield's unavailability . . . [a]nd the trial court accepted that stipulation, expressly recognizing that Maestas had met rule 804(a)(1)'s unavailability requirement as to Bloomfield's statement." Aple. Br. at 43-44. White's language, however, is unequivocal: The attorneys "[could not] claim a privilege against self-incrimination" for Bloomfield. White, 671 P.2d at 193. Rather, "'[i]n order for the claim to be honored by the court, it must [have been] made by the witness'" in response to "'a specific question.'"[2] Id. (citations omitted);

---

[1] Although Utah's rule 801 and its federal counterpart are similar, they are not identical. Utah's rule "deviates from the federal rule in that it . . . does not require the prior statement to have been given under oath or subject to perjury." Utah R. Evid. 801, advisory committee note. In other words, Utah's rule is broader than the federal rule because it allows the admission of prior inconsistent statements as substantive evidence even if they were not given under oath or subject to perjury. See id. Thus, United States v. DiSantis, 565 F.3d 354, 360 (7th Cir. 2009)—a federal case holding, according to the State, that "prior inconsistent statements of witnesses 'are admissible as non-hearsay, substantive evidence only if "subject to cross-examination" and "given under oath."'" Aple. Br. at 42—is not instructive in this case.

[2] The White Court cited to former rule 62(7) of the Utah Rules of Evidence. White, 671 P.2d at 193. Although the language of rule 804(a)(1) is slightly altered, the substance of the rule "is comparable to Rule 63(7) [Rule 62(7)], Utah Rules of Evidence (1971)." Utah R.

see State v. Montoya, 2004 UT 5, ¶15, 84 P.3d 1183 (holding witness will not be found unavailable until proponent of the evidence shows that he has used all reasonable means to secure the attendance of witness).

If, however, this Court agrees with the State that Bloomfield did not have to personally invoke the Fifth Amendment to become unavailable, this Court should reverse because, as explained in Maestas's opening brief, the exclusion of Bloomfield's statement "was erroneous." Aplt. Br. at 42-46. Moreover, this Court should reverse because defense counsel's failure to "'adequately investigate the underlying facts of [the] case, including the availability of prospective defense witnesses'" before trial forced her to rely on last-ditch, untimely, and unsuccessful motions on the morning of trial to get the exculpatory evidence admitted. Id. at 44-47 (citation omitted). Had defense counsel made a "thorough investigation of law and facts," Strickland v. Washington, 466 U.S. 668, 690 (1984), she would have been prepared to make the arguments necessary to get the evidence admitted or to file a timely motion to sever and get the evidence admitted later. See Aplt. Br. at 47-48.

D. Maestas Properly Addressed the Trial Court's Ruling on Rule 804(b)(3) and Showed that Defense Counsel Was Deficient for Failing to Fully Investigate the Facts of the Case and Rule 804(b)(3) Before Trial.

The State claims that this Court should reject Maestas's argument that the evidence was admissible under rule 804(b)(3) because he did not "address[] the full basis of the trial court's ruling." Aple. Br. at 44. In particular, the State faults Maestas for failing to address "the trial court's concerns" that Bloomfield's statement was protected by "attorney-client privilege"; that Garcia's question and Bloomfield's response were "ambiguous"; and that

---

Evid. 804, advisory committee note.

Garcia was unable "to exactly identify the circumstances under which he met Bloomfield or the time the meeting occurred." Id. at 44-45.

The second and third reasons cited by the State, however, were not part of the trial court's ruling. R. 218:865-67. Rather, they were part of the State's argument against admission. R. 218:860-63; see Aple. Br. at 44-45. The State assumes that the trial court incorporated the State's reasoning wholesale into its ruling when it said that it "agree[d] with what the State has indicated here." R. 218:866; see Aple. Br. at 44-45. This assumption, however, is inappropriate where the trial court explained its ruling on the record and did not mention either the ambiguity of the statements or Garcia's inability "to exactly identify the circumstances" of the statement. Aple. Br. at 44-45; see R. 218:665-67. In fact, both of these supposed concerns existed before Garcia testified, but the court was not concerned by them and was willing to admit the testimony. See R. 218:834-35, 840-41. It was not until Garcia's testimony raised concerns about whether Bloomfield knew Garcia represented Maestas and whether he was confused by his "previous involvement" with Garcia as representative of parole violators before the Board of Pardons that the trial court found grounds for excluding the evidence. R. 218:850-51, 866-67. Moreover, although the State alleges that Garcia's question and Bloomfield's response were "ambiguous," it labeled a similarly ambiguous question by Officer Horner and response by Maestas a confession and relied on it as solid evidence of guilt at trial. See R. 188:95-96, 112; 214:59-60. Thus, these two proposed bases were not part of the court's ruling and need not be addressed on appeal.

The other proposed basis—Bloomfield's statement was protected by the "attorney-client privilege" since his "statement was made to the attorney representing him at a parole

revocation hearing"—is overstated by the State. See Aple. Br. at 44. The trial court did not rule that Bloomfield's statement was protected by the attorney-client privilege. Indeed, there would not have been grounds for the trial court to hold that Bloomfield's statement was protected by the attorney-client privilege. "A client has a privilege to refuse to disclose and to prevent any other person from disclosing *confidential communications* made for the purpose of facilitating the rendition of professional legal services to the client between the client and the client's . . . lawyers." Utah R. Evid. 504(b) (emphasis added). "A communication is 'confidential' if not intended to be disclosed to third persons . . . ." Utah R. Evid. 504(a)(6). In this case, Bloomfield made the statement to Garcia "in the holding area" at the courthouse. R. 218:849-50. There were "a lot of people back there," R. 218:853; and the conversation was not whispered between an attorney and client huddled together for privacy, but was spoken openly for anyone to hear. See R. 218:849-50, 853. Thus, it did not meet the definition of a confidential communication. Furthermore, no one with authority to invoke the attorney-client privilege—Bloomfield, his attorney, or, according to the State, Garcia—invoked the privilege. R. 218:856-57; see Utah R. Evid. 504(c) ("The privilege may be claimed by the client. . . . The person who was the lawyer at the time of the communication is presumed to have authority to claim the privilege on behalf of the client."). To the contrary, Garcia readily testified about the statement, R. 218:849; and Bloomfield's counsel agreed that the statement could come in, only asking to sanitize the prejudicial circumstances surrounding the conversation. R. 218:838-39, 842-43, 856-57, 864.

Rather, the trial court merely expressed concern about whether Bloomfield knew Garcia represented Maestas and whether he was confused by his "previous involvement"

with Garcia as a representative of parole violators before the Board of Pardons. R. 218:850-51, 866-67. These questions caused the trial court to reverse its prior ruling and to exclude Bloomfield's statement under rule 804(b)(3) because it was not a statement "against interest" and lacked "trustworthiness."' R. 218:866-67.

In his opening brief, Maestas acknowledged Garcia's testimony "that he was 'pretty sure' Bloomfield knew he represented Maestas," "that he 'represent[ed] parole violators,'" and that "Bloomfield's case may have been on his calendar in that capacity but 'it was continued because of the pending charge.'" Aplt. Br. at 14-15 (quoting R. 218:850-51). He further acknowledged that Garcia's testimony caused the trial court to exclude Bloomfield's statement because it raised "concerns that the statement was not 'against interest' and lacked 'trustworthiness.'" Aplt. Br. at 15, 44 (quoting R. 218:866), Addendum D.

Despite these circumstances, Maestas argued that the trial court's exclusion of the evidence under rule 804(b)(3) was erroneous because the prior statement was a statement against interest and "the circumstances indicate the statement's trustworthiness." Aplt. Br. at 44-46. Although the trial court was concerned that Bloomfield may not have known Garcia represented Maestas and may have been confused by his "previous involvement" with Garcia as a lawyer for parole violators, the record still showed that Bloomfield did not intend the statement to be a confidential communication because he made the statement out loud in a crowded holding cell where any number of the many people present could have heard. R. 218:849-50, 853. Moreover, as explained in the opening brief, the statement was against interest because it placed Bloomfield at the scene of the accident, it revealed that he was with Maestas and Tuiasoa in the bar and during the race, and it was, as all the parties

agreed, sufficient grounds for him to invoke the Fifth Amendment. See Aplt. Br. at 44.

Additionally, the circumstances indicated the statement's trustworthiness. See id. at 43-46. First, the statement was voluntary, consistent, and based on personal knowledge. See id. at 44-45. Second, it was unlikely that Bloomfield would lie to protect Maestas, who was a mere friend and acquaintance, if Maestas was driving the Cadillac that killed Tuiasoa, a man he regarded as a brother. See id. at 45. This is particularly true since protecting Maestas would also have required Bloomfield to tarnish his brother's name and falsely implicate him in a crime. See id. Third, the month-long delay between the accident and the statement did not diminish the trustworthiness because it was caused by the police who interviewed Bloomfield but never asked him if he saw who was driving the Cadillac. See id. at 45-46.

In sum, the trial court's exclusion of Bloomfield's statement under rule 804(b)(3) was erroneous because the prior statement was against interest and "the circumstances indicate the statement's trustworthiness." Aplt. Br. at 44-46. Moreover, defense counsel's failure to adequately investigate the facts of the case and the various legal avenues available to get Bloomfield's statement admitted at trial constituted ineffective assistance.

CONCLUSION

This Court should reverse and remand for a new trial.

SUBMITTED this 7 day of April, 2011.

Lori Seppi

LORI J. SEPPI
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, LORI J. SEPPI, hereby certify that I have caused to be hand-delivered the original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, P.O. Box 140230, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 7 day of April, 2011.

Lori Seppi
LORI J. SEPPI

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this 7 day of April, 2011.